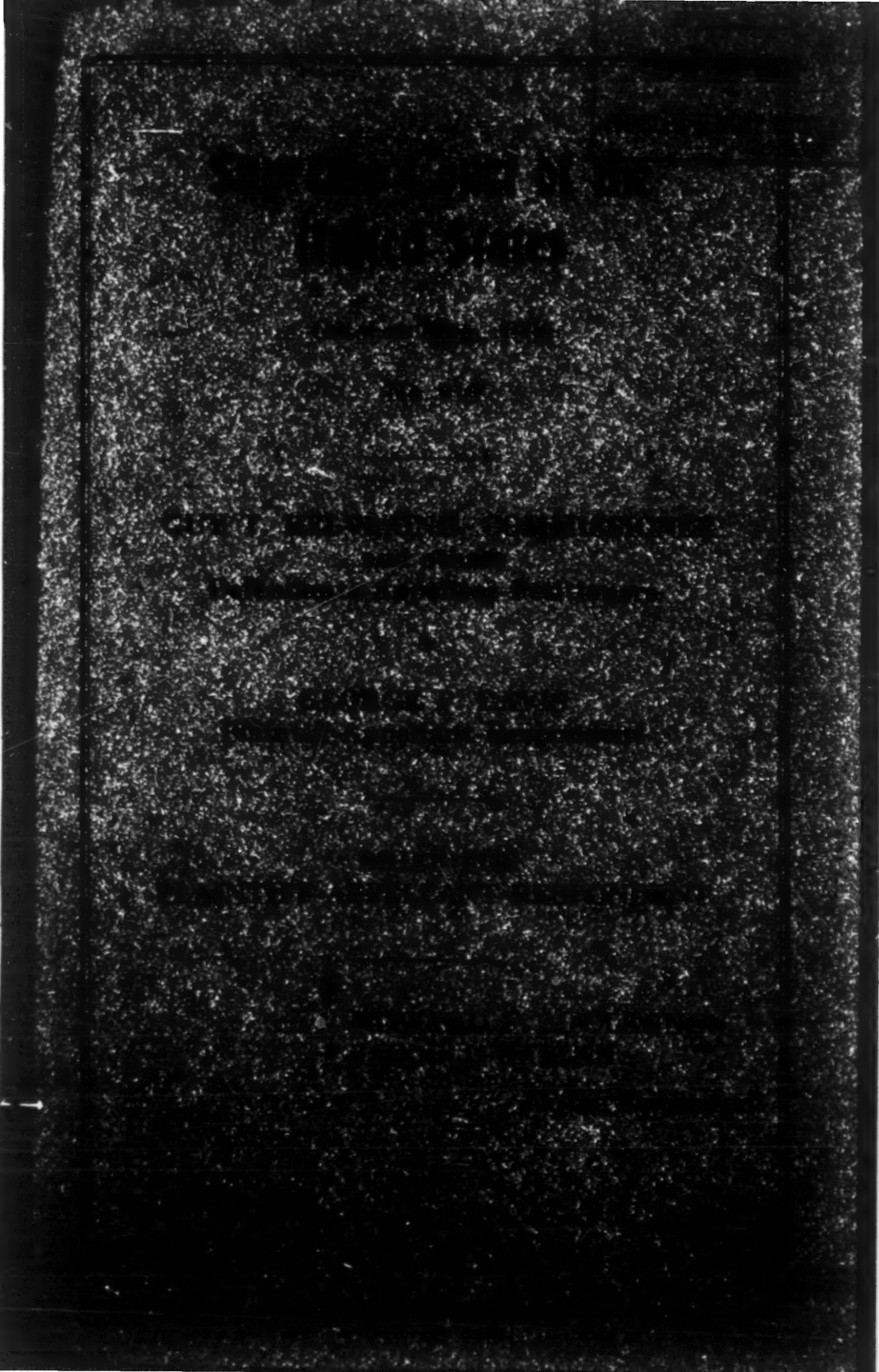


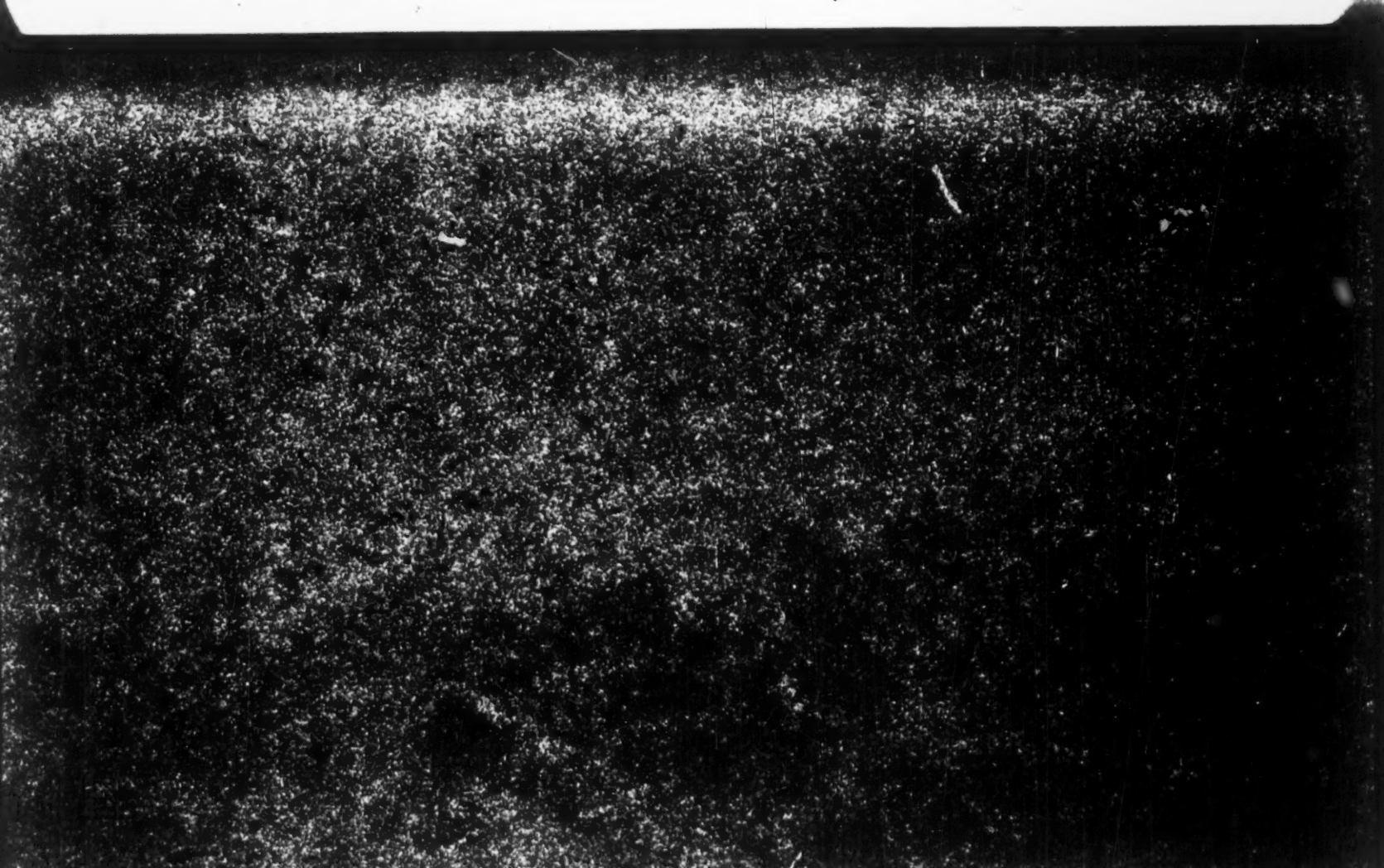


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5. To provide old age benefits such as are described in Title II is not a purpose for which The Congress has power to tax; because this purpose is not for the common defense or to pay the debts of the Government of the United States or to provide for the general welfare of that Government; and the power of The Congress to tax does not extend beyond providing for these three purposes 47–58

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STATEMENT OF THE CASE

This case is before this Court on certiorari granted to review a decision of the United States Circuit Court of Appeals for the First Circuit handed down under date of April 14, 1937, that the impositions of Title VIII of the so-called Social Security Act are not a valid exercise of the power of Congress and that the decree to the contrary, entered in the District Court for the District of Massachusetts on January 28, 1937 is reversed (R. 34; — Fed. (2d) —).

November 17, 1936, George P. Davis the plaintiff stockholder in the defendant The Edison Electric Illuminating Company of Boston brought this suit against this corporation to obtain an injunction to prevent the payment of this alleged tax, by the corporation. The necessary facts were present, to entitle the plaintiff to an injunction, if the imposition is not valid. The Commissioner of Internal Revenue and the Collector for the Massachusetts District, on their own motion were admitted as parties defendant.

THE CONSTITUTION OF THE UNITED STATES

"WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Sect. 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."

. . .

"Sect. 8. The congress shall have power — to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; — to borrow money on the credit of the United States; — to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; — to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; — to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; — to provide for the punishment of counterfeiting the securities and current coin of the United States; — to establish post offices and post roads; — to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; — to constitute tribunals inferior to the supreme court; — to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; — to declare

war, grant letters of marque and reprisal, and make rules concerning captures on land and water; — to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; — to provide and maintain a navy; — to make rules for the government and regulation of the land and naval forces; — to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; — to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress; — to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; — and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

"Sect. 9. . . .

No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. . . ."

"ARTICLE VII.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same."

AMENDMENTS

"Art. V. No person shall . . . nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Art. IX. The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

"Art. X. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

"Art. XVI. The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

SOCIAL SECURITY ACT, TITLE VIII, SECTIONS 804 and 802, DESCRIBED.

Title XI, Section 1105, of Chapter 531, August 14, 1935, 49 Stat. 620, 648, United States Code Title 42, Chapter 7, provides that "This Act may be cited as the 'Social Security Act'." This citation is misleading. This attempted Act is not social. It is anti-social. It attempts to put Society's burden on a fraction capriciously picked. It does not provide security. In Sections 804 and 802 (U. S. C. Tit. 42 Ch. 7 Sec. 1004, 1002) it is not an Act of The Congress within its powers under the Constitution of the United States. The reasons for this assertion are deferred until the sections have been described. They are the only sections whose validity is involved in this suit. The invalidity is intrinsic in these sections, when judged by themselves, and also when judged in the setting in which they occur.

The singularity of the Act is shown by the fact that it begins as "AN ACT To provide for the general welfare by **establishing a system of Federal old-age benefits,** and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes." and then proceeds in eleven titles, and ends with the provision that **"This Act may be cited as the 'Social Security Act'."** (Type not heavy in original.)

It is not an Act to provide general revenue for the Government of the United States.

Title VIII is, "Taxes with respect to employment".

Title II is, "Federal old-age benefits".

Section 804 is: —

"EXCISE TAX ON EMPLOYERS

Sec. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years of 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum."

Section 802 is: —

"DEDUCTION OF TAX FROM WAGES

Sec. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(b) If more or less than the correct amount of tax imposed by section 801 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent wage payments to the same individual by the same employer."

Employees are not made liable to pay a tax. It is not paid from any money which they get or retain the right to get. There is really an imposition in the name of an excise tax of 6% on employers who in return are accorded the right to perform fully their contracts with their employees by paying 97% of the agreed amount. The 3% under Title IX is additional.

Section 801 is: —.

"INCOME TAX ON EMPLOYEES

Section 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum."

Section 811 is: —

"DEFINITIONS

Sec. 811. When used in this title —

(a). The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except —

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Casual labor not in the course of the employer's trade or business;

(4) Service performed by an individual who has attained the age of sixty-five;

(5) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(7) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

By the conjunction of Section 811 with the earlier sections, the excise, and the income tax, described are not upon wages. They are measured by wages of $3,000 or less in any calendar year in an employment not at agricultural labor, or domestic service in a private home, or casual labor, or the other excepted services described in Section 811.

Title II, Section 210, describes the kind of wage earners in the kinds of employment that are to become entitled to old-age benefit payments under Section 202 after attaining the age of sixty-five years and January 1, 1942.

This description in Section 210 is identical in words and punctuation with the description in Section 811 except that item (4) of Section 811, which excludes from the tax, service performed by an individual who has attained the age of sixty-five, does not appear in Section 210 and therefore the succeeding paragraphs are numbered one lower.

It is obvious that the exclusion of individuals over sixty-five from the tax liability is because they have come into the benefit class under Section 202 by reaching sixty-five years of age.

1. THE ATTEMPTED LEVY IS TO PROVIDE OLD AGE BENEFITS SUCH AS ARE DESCRIBED IN TITLE II.

On the face of the Act, even ignoring all that has been said publicly and in The Congress and in the Committee reports, the conclusion is inescapable that the impositions under Title VIII are to provide for the benefits under Title II.

It cannot be supposed that men in The Congress possessed of their reason would select as the basis for raising general revenue for the Government of the United States, the income of a portion of the small wage earners to the exclusion of all other persons gainfully employed and to the exclusion of all large wage earners, and to the exclusion of wealth.

It cannot be supposed that such men in The Congress would pick for the production of general revenue for the Government of the United States, the employment of a portion of the small wage earners to the exclusion of all others gainfully employed and to the exclusion of the large wage earners and to the exclusion of profits, income, gross receipts, net receipts, extent of business, and wealth used or owned.

The conclusion is inescapable that these impositions under Sections 804 and 802 were for the purpose of providing the fund set up by Section 201 to furnish the benefits described in Section 202.

The men in Congress proclaimed that this was a Social Security Act. It furnishes no security for old-age benefits unless the sums which the employers are required to pay by Sections 804 and 802 are to furnish that security. Section 804 ultimately calls for 3% of this limited kind of wages of a limited group. Section 802 calls upon the employer for another 3%, and permits the employer to reimburse himself by paying to

this limited group of wage earners only 97% of the sum which he has agreed to pay his employees.

It is not to be supposed that the men in Congress would permit this reduction of wages unless to give to the wage earners so imposed upon, the security of a fund for old-age benefit payments to them.

Section 201, which spoke at the same time — August 14, 1935 — as Sections 804 and 802, provided that "There is hereby authorized to be appropriated to the Account for each fiscal year". It is evident that the source of this appropriation was the money to come from Sections 804 and 802.

This is confirmed by the postponement of the beginning of benefit payments to January 1, 1942. If the Government of the United States from its general revenues ought to provide benefit payments for workers over sixty-five years of age, there is no reason for postponing those benefits for six years. It is manifest that the reason for this postponement was to give time within which the impositions under Title VIII would accumulate sufficiently.

It is only if these impositions are security for these benefits that the Title "Social Security Act" could be adopted honestly.

Thus far, the matter considered is the text of the attempted statute read in the light of general information. The Court is asked to consider now the particulars surrounding the attempted passage of the Act.

June 28, 1934, the President, by Executive Order No. 6757, created the Committee on Economic Security and provided further for a technical board and staff for the same.

In November, 1934, the President appointed an Advisory Council on Economic Security.

January 15, 1935, the Committee on Economic Security reported to the President.

January 17, 1935, the President transmitted this report with his approval to The Congress in a special message urging prompt action.

This report covers fifty pages dealing with the gravity of the problems of economic want and insecurity. It recommends a general outline for legislation by The Congress and by the States, broad enough to include what later entered into the so-called Social Security Act. Nowhere does it contain any suggestion that the proposed Federal tax shall be to provide revenue for the general purposes of the Government of the United States.

The Committee's letter of transmittal to the President says of the measures proposed: — "They represent, however, our best judgment as to the steps which ought to be taken immediately toward the realization of what you termed in your recent message to the Congress 'the ambition of the individual to obtain for him and his a proper security, a reasonable leisure, and a decent living throughout life.' "

The report shows, convincingly, that the excise and the income tax described in Title VIII were intended not as taxes in the true sense but as compulsory contributions toward the old-age benefits described in Title II, namely: —

"OLD-AGE SECURITY. To meet the problem of security for the aged we suggest as complementary measures, noncontributory old-age pensions, compulsory contributory annuities, and voluntary contributory annuities, all to be applicable on retirement at age 65 or over.

"Only noncontributory old-age pensions will meet the situation of those who are now old and have no means of support. Laws for the payment of old-age pensions on a needs basis are in force in more than half of all States and should be enacted everywhere. Be-

cause most of the dependent aged are now on relief lists and derive their support principally from the Federal Government and many of the States cannot assume the financial burden of pensions unaided, we recommend that the Federal Government pay one-half the cost of old-age pensions, but not more than $15 per month for any individual.

"The satisfactory way of providing for the old age of those now young is a contributory system of old-age annuities. This will enable younger workers, with matching contributions from their employers, to build up a more adequate old-age protection than it is possible to achieve with noncontributory pensions based upon a means test" . . .

"Contributory annuities are unquestionably preferable to noncontributory pensions. They come to the workers as a right, whereas the noncontributory pensions must be conditioned upon a 'means' test. Annuities, moreover, can be ample for a comfortable existence, bearing some relation to customary wage standards, while gratuitous pensions can provide only a decent subsistence" . . .

"It is only through a compulsory, contributory system of old-age annuities that the burden upon future generations for the support of the aged can be lightened" . . .

"Because of the large number of people involved and the other duties imposed on the social insurance board (which we recommend should have responsibility for the administration of all types of social insurance), we deem it desirable that the taxes to finance this system should not become effective until January 1, 1937, . . ."

. . .

"We recommend that the contributory annuity system include, on a compulsory basis, all manual workers and non-manual workers earning less than $250 per

month, except those of governmental units and those covered by the United States Railroad Retirement Act." . . .

"The compulsory contributions are to be collected through a tax on pay rolls and wages, to be divided equally between the employers and employees" . . .

"Both the tax on employers and the employees is to be collected through the employers, who shall be entitled to deduct the amount paid in the employees' behalf from wages due them" . . .

"We suggest that the Federal Government make no contribution from general tax revenues to the fund during the years in which income exceeds payment from the funds, but that it guarantee to make contributions, when the level of payment exceeds income from contributions and interest, sufficient to maintain the reserve at the level of the last year in which income exceeded payments" . . .

"No benefits are to be paid until after the system has been in operation for 5 years, nor to any person who has not made at least 200 weekly contributions, nor before the member has reached the age of 65 and retired from gainful employment." . . .

"The plan outlined above contemplates that workers who enter the system after the maximum contribution rate has become effective will receive annuities which have been paid for entirely by their own contributions and the matching contributions of their employers." . . .

Clearly defined are these taxes as essentially compulsory contributions to an old-age annuity fund for out-payment after January 1, 1942 to those over 65.

This report portrays a scheme for legislation substantially as carried into the text of the so-called Social Security Act. It emphasizes that the so-called excise and income tax in Title VIII are but compulsory

contributions to produce the fund described in Title II to pay old-age benefits.

January 17, 1935, Senator Wagner presented to the Senate [S. 1130] and Representatives Doughton and Lewis presented to the House [H. R. 4120] bills incorporating the President's recommendations. These were immediately referred to the Senate Committee on Finance and the House Committee on Ways and Means, respectively.

Committee hearings were held on these bills.

April 4, 1935, Representative Doughton introduced a bill [H. R. 7260] which on that day was referred to the Ways and Means Committee.

The next day, the Committee reported [House Report 615, 74th Congress, 1st Session, April 5, 1935] the bill which the Congressmen later purported to pass.

April 11, 1935, the House resolved into Committee of the Whole House on the State of the Nation, for consideration of the bill.

April 17, 1935, the members of the House purported to pass the bill.

In May, 1935, the Senate Committee on Finance considered the bill and reported favorably with amendments [Senate Report No. 628, 74th Congress, 1st Session, 1935].

June 19, 1935, the Senate purported to pass the bill with the amendments which had been reported by its Committee.

The matter went to Conference, and was reported back by the Conference Committee.

August 8, 1935, the members of the House purported to pass the Act.

August 9, 1935, the Senators did the same.

August 14, 1935, the President approved, as Public Act No. 271 of August 14, 1935, 74th Congress, 1st Session, 1935.

The Report No. 615 submitted April 5, 1935 by the Committee on Ways and Means, which recommended the enactment of the particular law in the terms of the so-called Social Security Act, contains a number of significant statements as to its purpose and expected effect.

The Report contains no suggestion that the Act is designed to raise general revenue. It is directed throughout to a consideration of the needs of relieving against distress due to the various conditions covered by the various Titles.

"Title II: A system of Federal old-age benefits, payable to people who have reached the age of 65, will begin in 1942. These benefits are to be measured by wages, and are payable wholly regardless of the need of the recipient." . . .

"Title VIII: An income tax, measured by a certain percentage of wages (beginning with 1 percent in 1937 and increasing to 3 percent by 1949), is levied on most wage earners, with certain large groups, such as domestic servants and agricultural laborers, exempted. An excise tax, measured at the same rates on wages paid, is levied on employers, with similar exemptions. These taxes first take effect on January 1, 1937." . . .

"The Committee on Ecomonic Security . . . made a unanimous report to the President in January of this year, which the President transmitted to both Houses of the Congress, with his endorsement of the legislation recommended therein, . . . "

"The bill is designed to aid the States in taking care of the dependent members of their population, and to make a beginning in the development of measures which will reduce dependency in the future. It deals with four major subjects: Old-age security, unemployment compensation, security for children, and public health." . . .

"To keep the cost of Federal-aided State pensions under title I from becoming extremely burdensome in future years, and to assure support for the aged as a right rather than as public charity, and in amounts which will insure not merely subsistence but some of the comforts of life, title II of the bill establishes a system of old-age benefits, paid out of the Federal Treasury, and administered directly by the Federal Government." . . .

Support for the aged cannot thus be made a right unless the taxes which they have paid are essentially contributions to the fund to which they have this right.

The Report [Senate No. 628, May 1935] follows the general course of the above-described Report of the Committee of the House. This Report says: —

"As the titles of the bill indicate, it consists of a series of related measures designed as a unified, well-rounded program of attack upon the principal causes of insecurity in our economic life. These measures may be divided into five broad fields: (1) Old-age security, (2) unemployment compensation, (3) aid to dependent children, (4) public health measures, and (5) aid to the blind."

"Provision for the people who are now old and dependent upon the public for support is the first essential in old-age security. It will not, however, solve the entire problem. The cost of free pension systems the world over has tended to increase rapidly and in course of time has necessitated the establishment of contributory annuity systems." . . .

"There is serious danger that if only title I is enacted, this country will, before long, adopt the principle of free pensions for all old people, to be paid for from general taxes. Such a system would involve costs far exceeding any of the figures mentioned, and would bring with it evils of the most serious character, with

much greater burdens upon industry than anything that is proposed in this bill.

"In view of the growing number of the aged, the great cost which title I is almost sure to entail in future years, if no other provisions are made for old-age security, and the desirability of providing old-age security as a right and not as public charity, this bill proposes also inauguration of a system of Federal old-age benefits, computed on a reserve basis." . . .

The report in the Senate, as well as that in the House, confirms the conclusion to be drawn from the report of the Committee on Economic Security, that the impositions in Title VIII are not taxes for general revenue but are compulsory contributions to create the fund defined by Title II for payment of old-age benefits.

It is immaterial that the impositions are to be paid into the Treasury of the United States. That is the place from which the benefits defined by Section 202 are to be paid under Section 207, to the recipients; and that is the place where under Section 201 the reserve account is to be kept.

That is the normal place for collections for a particular purpose.

If from the language and the context, the purpose for which the imposition is laid can be ascertained, the Court is not required to remain blind thereto.

> *Grosjean* v. *American Press Co.*, 297 U. S. 233.
> *Trusler* v. *Crooks*, 269 U. S. 475.
> *United States* v. *Butler*, 297 U. S. 1.

Ordinarily, an imposition described by The Congress as a tax, is payable into the Treasury of the United States. This does not establish that it is a revenue measure.

The title of an Act and its whole content may be inspected to see that The Congress intended the imposition to be for a particular purpose and not merely to produce general revenue for the United States.

Hill v. *Wallace*, 259 U. S. 44.
Child Labor Tax Case, 259 U. S. 20.
Carter v. *Carter Coal Co.*, 298 U. S. 238 (semble).
United States v. *Constantine*, 296 U. S. 287, 294, (semble).

The impositions defined in Sections 804 and 802 are clearly not taxes for general revenue of the Government of the United States.

Cases cited above.

They are compulsory contributions to the reserve account defined by Section 201, from which, under Section 207, benefits are to be paid to the persons described in Section 202 as defined in Section 811.

2. THE IMPOSITION IS NOT AN EXCISE AS THAT WORD IS USED IN THE ONLY CLAUSE OF THE CONSTITUTION WHICH EMPOWERS THE CONGRESS TO LEVY TAXES.

This is one of the grounds for the decision of the Circuit Court of Appeals (R. 30, — Fed. (2d) —). That court states the reasons for this, in the opinion handed down the same day, April 14, 1937, in the case of *Davis* v. *Boston and Maine Railroad*, dealing with the invalidity of Title IX of the so-called Social Security Act (R. 55 in that case, — Fed. (2d) —).

"Excise" had a well understood meaning in England and in the Colonies for at least one hundred and forty years before it was used in the Constitution. It meant an inland levy on selected tangible property, or upon the owners of it, because of the activity in which the property was moving. The motion might be manufacture; it might be intermediate sale; it might be ultimate sale commonly amounting to consumption. The antithesis was the direct tax upon property in general, certainly land, when taxed on a rate fixed by its static appraised capital value and possibly when measured by its annual unwrought return in rent, income or products, and, debatably, upon personal property so appraised or judged.

Both the direct tax and the excise were prominently property taxes, — one regardless of its activity or inactivity, and the other taking that activity into consideration.

Dr. Johnson, in the Third Edition of his Dictionary in 1766, defined "excise" as "a hateful tax levied upon commodities, and adjudged not by the common judges of property". In the same time and place, he defined "commodity" as "interest, advantage, profit, convenience of time or place, wares, merchandise".

"Commodity" suggests as the principal thought, merchandise. If a town meeting were urged to place a tax on commodities, the voters attending would think of whisky, ale, tea, and not of incorporeal rights.

Adam Smith in 1776, in "The Wealth of Nations", says: "The duties of excise are imposed chiefly upon goods of home produce destined for home consumption. They are imposed only upon a few sorts of goods of the most general use. There can never be any doubt either concerning the goods which are subject to those duties, or concerning the particular duty which each species of goods is subject to. They fall almost altogether upon what I call luxuries, excepting always the four duties above mentioned, upon salt, soap, leather, candles, and, perhaps, that upon green glass."

The Massachusetts constitution of 1780 indicated direct taxes to be the normal source of revenue but gave the legislature authority to impose "reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever". It is submitted that these words "reasonable" and "produce" and those following it were not set out as limitations on the kinds of excises. They were there as clarifications of the intrinsic meaning of the word. "Commodities" was used in association with other words descriptive of tangible things. No intention to add more by the word "Commodities" is to be inferred. "Merchandise" and "wares" were already included in "goods". There is no more tautology in the addition of "commodity" to mean no additional class than in the addition of "merchandise" and "wares" to "goods". These two words could not add a class which was not already covered by "goods".

The Constitutional Convention of New York in 1788 urged its representatives to obtain several amendments to the Constitution one of which was, "That the

Congress do not impose any excise on any article (ardent spirits excepted) of the growth, production, or manufacture of the United States, or any of them." (1 Elliot's Debates on the Federal Constitution, p. 329.) These were the words of men who understood excises as falling on tangible things.

In the Massachusetts Convention in 1788, Mr. Symmes, in speaking to this phrase, said: — " . . . Congress may lay an impost on the produce and manufactures of the country, which are consumed at home." (2 Elliot's Debates, p. 72.)

Luther Martin in 1788 said: — "By the power to lay excises, — a power very odious in its nature, since it authorizes officers to go into your houses, your kitchens, your cellars, and to examine into your private concerns, — the Congress may impose duties on every article of use or consumption, on the food that we eat, on the liquors that we drink, on the clothes that we wear, the glass which enlightens our houses, or the hearths necessary for our warmth and comfort." (1 Elliot's Debates, p. 368.) If this forceful gentleman had conceived of the idea that Congress could lay an imposition on the natural universal right to employ a consenting wage earner or the natural universal right of the wage earner to obtain wages by the consent of the employer, he would have mentioned it at this point. Evidently he conceived of an excise as an imposition on tangible property.

In the New York Convention in 1788, Chancellor Livingston said: "We may naturally suppose that wines, brandy, spirits, malt liquors, &c., will be among the first subjects of excise." (2 Elliot's Debates, p. 341.) He said this, when speaking to the proposed amendment to prohibit excises on manufactures of the United States. He was talking of an imposition on tangible property.

In the Virginia Convention in 1788, Mr. Nicholas said: "We are next terrified with the thought of excises. . . . They are a kind of tax on manufactures." (3 Elliot's Debates, p. 243.)

In the "Debates in the Congress of the Confederation" in 1783, Mr. Wilson, in discussing the probability of an excise, said that wine and imported spirits had borne a heavy excise in other countries and might be adopted in ours; that coffee is another object which might be included. (5 Elliot's Debates, p. 40.)

Hamilton speaks of the excise as "Taxes on Articles of Consumption". (The Federalist, No. 21, Dec. 12, 1787, p. 182.)

So says Ellsworth in the Connecticut Convention (2 Elliot 192). It is the property which is taxed, and not the act of consuming it. The short-cut expression "consumption taxes" generally means taxes on goods designed for early consumption and manufactured, sold, and bought for that purpose (The Federalist, p. 267, 275).

Gallatin speaks of it as an excise on "consumable commodities" (Writings of Gallatin, p. 73). Evidently he means by "commodities" tangible articles. Men do not "consume" incorporeal rights.

Hume, in his history of England published approximately thirty years before the adoption of the Constitution, in speaking of the situation at the time of the long Parliament when the excise novelty came in, said: — "So extremely light had government hitherto lain upon the people, that the very name of *excise* was unknown to them; and among the other evils arising from these domestic wars was the introduction of that *impost* into England. The parliament at Westminster having voted an excise on beer, wine, and other commodities, those at Oxford imitated the example and conferred that revenue on the King." (5 Hume, Ed.

of 1861, p. 269.) It was an imposition on these commodities used in the sense of goods. It was an impost laid on tangible property.

Clarendon in the History of The Rebellion in England (Vol. II, p. 453) said substantially the same. He also says "This was the first time that ever the name of payment of excise was heard of or practised in England."

Commodity was used in the same sense that in later days it has been used in transportation. A commodity rate as distinct from a class rate, is a rate on a particular kind of merchandise.

Blackstone, twenty-two years before the adoption of the Constitution, after speaking of other forms of taxation, said: "Directly opposite in its nature to this is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." (1 Blackstone, p. 308.)

Evidently "commodity" is here used in the sense of tangible property.

Encyclopedia Britannica, in the Third Edition, 1797, gives Blackstone's definition as still the definition.

Even more convincing than the contemporary definitions for 1788, are the many usages exemplary of the real character of an excise as the word then was used in the communities contracting by the Constitution.

Overwhelmingly, and it would seem safe to say universally, the imposition was on tangible property usually articles of merchandise for current use, often described as "commodities".

Early British Excises

What has been called the first British excise act — that of March 28, 1643, imposed an impost on articles

of consumption listed in a schedule, such as ale, beer, cyder, perry, strong waters, and other described articles.

In January, 1644, this was extended to other "commodities made or growing in England not formerly charged with excise". It was these classes of merchandise that were called "commodities".

They were indifferently described as "commodities" and as "goods".

On the return of Charles, the laying of excises on selected goods continued. It was on commodities, — meaning, by that term, merchandise — in manufacture, trade or consumption.

The Revenue Act of 1777 (17 Geo. III, c. 39) cited for the Defendant laid a duty of one shilling per annum for every male servant of the kinds described. It was a luxury tax like the window tax. This is shown by the fact that the Act contained these words: — "Provided always, That this Act shall not extend to any Servant who shall be retained or employed bona fide for the Purposes of Husbandry or Manufacture, or of any Trade or calling by which the Master or Mistress of such Servant earn a Livelihood or Profit." This luxury tax was to be administered in the same manner as the window tax, which in turn was in reality a tax on the house crudely measured by the number of windows. Its repeal was because it was decided that it did not bear a sufficiently direct relation to the value of the house.

The Act of 1777 did not describe the levy as an excise. Even if it had, little light would have been shed thereby on the meaning of "excise" in the States of the United States. They were not much influenced after July 4, 1776 by taxation by the British Parliament.

Meanwhile, the term "excise" had come to get a meaning in the Colonies, by use there.

Excises in New York before 1788

By October 23, 1713, New York had "An act for laying a duty on Goods sold by Auction, vendue or out-cry." (Vol. I of "The Colonial Laws of New York from the Year 1644 to the Revolution, Transmitted to the Legislature by the Commissioners of Statutory Revision, Pursuant to Chapter 125 of The Laws of 1891", p. 789.)

May 16, 1691, there had been laid "an Excise upon all Brandy, Rum and other Distilled Liquors to be retailed within this Province under fifteen gallons" (Vol. I, same publication, p. 248). This act included an excise on other wines and liquors.

December 23, 1775, there is "An Act to Regulate the Collecting the Duty of Excise on Strong Liquors retailed in this colony". (Vol. IV, same publication, p. 1.)

Other similar acts laying an excise on liquors followed from this time to 1784. (Vol. I, Laws of the State of New York passed at Sessions of the Legislature held in the Years 1775 to 1788, p. 109, 660.)

December 1, 1756, an excise on tea was imposed. (Vol. IV, Colonial Laws, *supra*, p. 105.)

The expression "excise" in New York in this period appears to be confined to inland duties or imposts upon commodities in the sense of "goods".

Excises in Pennsylvania before 1788

February 18, 1777 there is "An act authorizing the Collectors of the excise due and to become due on Spirituous Liquors to collect the same and directing the Mode of obtaining Tavern and other Licenses for other purposes therein mentioned." (IX Statutes at Large of Pennsylvania, 1776–1799, p. 55.)

Excises in Massachusetts before 1788

Nearly contemporaneously with what has been asserted to be the first excise law in England, the Colony of New Plymouth in 1646 enacted "That these excises shalbe imposed to be payd by all that are lycensed to retayle wines strong water and y^{t} sell Tobaccoe as followeth vizt upon every gallon of Spanish wine eight pence . . . " This is followed by a list of other strong waters, wines, tobaccos, and certain fish. This excise was on the "goods". (Plymouth Colony Laws, 1836, p. 85.)

June 24, 1692, the Massachusetts Colony enacted that there may be paid "an excise upon all wines, brandy, rhum and other distilled liquors, perry, beer, ale, cyder, and metheglin, that shall be sold [by] retail" to be paid by the retailer (Vol. I, Acts and Resolves of the Province of Massachusetts Bay, Chapter 5, p. 32).

Thereafter follow many acts, imposing an excise on "goods" (Vol. I, same, pp. 57, 272, 391, 475, 527, 662, 738; Vol. II, same, pp. 203, 849; Vol. III, same, pp. 495, 568, 750; Vol. IV, same, p. 219).

In this Colony it would appear by investigation of the many laws in the four volumes that the term "excise" was confined to this class of taxes.

The last reference above cited from the Laws of The Colony was in the year 1759.

The usage continued in the State. The Act of November 1, 1781, Chapter 17, was "An Act laying certain Duties of Excise on certain articles therein mentioned" (Vol. I, Laws of Massachusetts, p. 60). Others in like tenor followed in 1782 and 1783 (Same volume, pp. 62, 78, 85; Laws and Resolves of 1782, Chapter 33, p. 92).

It is respectfully submitted that the prior and contemporaneous utterances overwhelmingly tend to the

conclusion that an excise was in character an inland duty or impost on a tangible commodity in manufacture or in sale either in the course of trade or for consumption. It was not cut out of the activity. It was cut out of the goods. It did not rest on the activity. It rested on the goods, and was payable for the quantum of goods by the manufacturer, the seller, or the purchaser of them.

This "page of history is worth a volume of logic" (Mr. Justice Holmes, 256 U. S. 349).

If this position is wrong, and the term "excise" included an imposition on something other than selected tangible property or on the owner or handler of it, because of the property, it becomes necessary to define what other subject it covered according to the common meaning of the day. It is respectfully submitted that it is inconceivable that the intelligent people of the common run in the thirteen States could have understood that the word included an imposition on the state of being of exercising the universal natural right to employ, for wages, other men who consented to that employment, in a manner not injurious to the public good.

Supporters of this tax have urged that it is a tax upon a privilege. There is no privilege. The state of being on which the imposition is made is not derived from government or from public authority in any manner. Privilege contrasts with common natural opportunity. Contrast the privilege to do business without liability for debts, as in corporate form. Any dictionary of common meanings shows that "privilege" as used in this context means something not of common right.

The derivation confirms this. Privilegium was a law against or in favor of an individual. It was compounded of lex, a law, and privus, private.

There is nothing here present, even of an incorporeal nature, to satisfy the term. If this is a privilege, — breathing, sleeping, or holding decorous discussion of the weather may have an excise imposed on it equally well.

It is believed that no statute, of the United States or of any State, a party to the Constitution, lends the slightest color to the contention that there is something here which is subject to excise as that word is used in the Constitution.

If this imposition is not in character an excise, it is submitted that there is no occasion to go further. It is announced in the attempted Act as an excise tax. It does not conform to the requirements for a valid tax of any other kind, and it is not an excise.

There must be some limit to what is an excise.

Presumably the having of lungs with which to breathe, and nerves which permit sleep, will be conceded to be something which Congress cannot excise, and that if an attempted tax thereon could be supported it must meet the requirements of a capitation tax. On the other hand, a whisky tax is a foremost example of an excise. Between the two there is a boundary line which the men in Congress may not cross, and on crossing which they will not be acting as Congressmen. This case involves no necessity to set that boundary line. It is sufficient, if the Court observes that this particular imposition is beyond the bounds.

The word "excise" had a meaning in 1788, when the contracting thirteen States used it in their compact. For present purposes, that is the meaning which it has today, and the only meaning which it can have. Neither the Court nor The Congress is empowered to change that meaning by interpretation or expansion. Such procedure would mutilate the contract which was made.

Undoubtedly properties of modern times — as, for example, automobiles, — never thought of in 1788 may come within the meaning which the word had in 1788. But, if the state of being, of having individuals in a man's employ, — a thing of a character which existed in 1788, — did not then come within the meaning of the word, it is not there now.

The unlettered experienced carpenter set to saw a pile of boards to a given length, has found that if he saws each from the last one before, in most cases, by a process of negligible errors, he has created a grave one, and that the boards of his later sawings are wrong. Accordingly, he has adopted the policy of sawing them all by the application of his first one, which he marks as a pattern. It is not presumptuous to urge the worth of this example of the unlettered carpenter upon this cultured and enlightened Court.

The meaning in the Constitution of the word "excise", is the meaning that it had in 1788 in common usage of the common run of men in the thirteen contracting States who made the contract in State conventions of representatives chosen by those men of the common run. Judges and lawyers and statesmen formed a very small minority of the common men in the thirteen contracting groups. The understanding of the eminent and revered draftsmen and promoters of the Constitution is of no value to fix the meaning in any respect at variance with the common usage. They were not the ones who made the contract.

The tax here attempted is novel. A brief on it may seek first with reason the Court's own application of the Constitution to the proposal, in the exercise of its own skillful judgment on an original question, regardless of what other Justices have said at other times. Decorum does not require that the Justices be approached on this novel question as a congregation

of mere reporters of the language used by other Justices, in disposing of other questions.

Turn next from this appeal to the original judgment of this Court on this novel question. The Court now is asked to recall and to observe that nowhere in the precedents of the prior decisions and language of the Supreme Court of the United States is there any indication that this attempted tax is within the powers of The Congress; and that there is much in those decisions and in that language to show that such a tax is not within those powers.

An attempted act may be clearly without the powers of The Congress and a particular litigant nevertheless may have no right to invoke the judgment of the Supreme Court of the United States.

Massachusetts v. *Mellon*
Frothingham v. *Mellon* } 262 U. S. 447.
Florida v. *Mellon*, 273 U. S. 12.

Consequently, the fact that the validity of appropriation of the money of the United States in questionable ways has not been questioned before that Court, carries no implication that the appropriations were lawful, or approved by the people of the United States.

It may well be, also, that many unlawful appropriations have been thought so favorable to those who might otherwise have questioned them, that they would discourage any attempt to prevent them.

It is only in the last twenty years that inland taxes of the United States have become so burdensome, that it has been worth the extensive effort of many people, to prevent unlawful appropriations.

A person in terms obliged by an attempted invalid act to pay money to go into the Treasury of the United States, has a right to a decision.

United States v. *Butler*, 297 U. S. 1.

In considering the validity or not of a novel tax, attempted, the Court is not foreclosed from exercising its own judgment, by the misunderstandings of The Congress or of the Supreme Court of the United States, even if they have persisted unabated for a century.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S. 429.

An imposition on a particular class of tangible property, in manufacture, use, gift, bequest, or sale, may be sustained as an excise if it meets the other constitutional requirements, including that the end is to provide revenue for the general welfare of the Government of the United States and that the selection is not capricious or the tax anti-uniform.

Magnano v. *Hamilton*, 292 U. S. 40.
Bromley v. *McCaugn*, 280 U. S. 124.
N. Y. Trust Co. v. *Eisner*, 256 U. S. 345.
Billings v. *United States*, 232 U. S. 261.
McCray v. *United States*, 195 U. S. 27.
Thomas v. *United States*, 192 U. S. 363.
Cornell v. *Coyne*, 192 U. S. 418.
Spreckels Sugar Ref. Co. v. *McClain*, 192 U. S. 397.
Patton v. *Brady*, 184 U. S. 608.
Treat v. *White*, 181 U. S. 264.
Knowlton v. *Moore*, 178 U. S. 41, 84.
Nicol v. *Ames*, 173 U. S. 509.
Springer v. *United States*, 102 U. S. 586.
Railroad Co. v. *Collector*, 100 U. S. 595.
Scholey v. *Rew*, 23 Wall. 331.
Veazie Bank v. *Fenno*, 8 Wall. 533.
Pacific Ins. Co. v. *Soule*, 7 Wall. 433.
License Cases, 5 Wall. 462.
Hylton v. *United States*, 3 Dallas, 171.

Important documents, and paper, particularly commercial paper are tangible and valuable because of that fact.

Patton v. *Brady*, 184 U. S. 608, 617.
Cook v. *Pennsylvania*, 97 U. S. 566.

It has been held in at least one case that a franchise is a sufficiently palpable kind of property to permit an excise of it.

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 155, 162.

A tax does not cease to be an excise and become an income tax, merely because it is placed on income, if that is under the circumstances a reasonable criterion for the rate or amount of tax which should be imposed on that property. Income received is property.

Flint v. *Stone Tracy Co.*, 220 U. S. 107.

The Supreme Court of the United States never has held that the natural harmless state of being or natural harmless conduct privileged or unprivileged is subject to excise. Where the special privilege was a franchise derived from government and long recognized as itself a piece of property, although intangible, and produced property, *Flint* v. *Stone Tracy Co.*, permitted its excise.

This does not suggest that the state of being an employer with the consent of the employee in a common harmless calling is a privilege, or as such or otherwise, is property or anything but a natural universally attainable state not derived from government.

These decisions of the Supreme Court of the United States are supported by the prevailing and confirmed interpretation of the word "excise" by the Supreme Judicial Court of Massachusetts throughout the existence of the State, and recently with emphasis, that it is an imposition on property in industrial or trade

movement whether the word be used in the Constitution of the United States or in the constitution of the Commonwealth of Massachusetts.

Opinion of the Justices in 1933, 282 Mass. 619, *and many cases therein cited.*

The natural operation of employing with the consent of the employee, is not a privilege or any other type of property, tangible or intangible, which may be subjected to excise.

Opinion of the Justices, March 27, 1929, 266 Mass. 592, 595, *semble.*

" . . . we are not aware of any case in which an excise tax is shown to have been imposed upon the use of one's hands in simple manual labor, or upon the making of a simple contract, without the use of any auxiliary method, device, or machinery that might be availed of to establish one's rights under the government in courts and elsewhere. . . "

Opinion of the Justices, Knowlton, Morton and Braley, in 1908, 196 Mass. 624.

"In this Commonwealth, in dealing with the term 'commodity,' it has been held that an ordinary 'agreement or mode of transacting business' is not within its meaning, and cannot be made the subject of an excise tax. . . " (Same page)

" . . . the word 'is not broad enough to include every occupation which one may follow in the exercise of a natural right, without aid from the government, and without affecting the rights or interests of others in such a way as properly to call for governmental regulation'." (Same page)

Property may not be taken by government from one for another even for public advantage or welfare without just compensation.

Louisville Bank v. *Radford*, 295 U. S. 555, 601, 602.
United States v. *Butler*, 297 U. S. 1.
Railroad Retirement Board v. *Alton R. R. Co.*, 295 U. S. 330.

It makes no difference that it is done under the guise of a tax or is the product of a tax.

Loan Association v. *Topeka*, 20 Wall. 655.
Calder v. *Bull*, 3 Dallas, 386.
Miles Planting Co. v. *Carlisle*, 5 Ct. of Ap. D. C., 138, 146.

Even if a tax is levied expressly for the purpose of obtaining general revenue, if it appears "in the light of its history and of its present setting" that it is for a purpose which the Constitution does not permit the law-making body to accomplish, the tax is bad.

Grosjean v. *American Press Co. Inc.*, 297 U. S. 233, 250.

Heretofore, *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S. 397, has been put forth for the defendants Helvering and Welch as their main authority to support the contention that the attempted levy at bar is an excise within the Constitution. This decision contains nothing at variance with the definition of the word "excise" for which the plaintiff contends. The tax in the cited case (p. 398) was expressly "upon the gross annual receipts, in excess of a named sum, of every person, firm, corporation or company carrying on or doing the business of refining sugar".

The sole question was whether this was a direct tax requiring apportionment. It was not. It was on receipts of property. There is nothing in the case even remotely to suggest that an excise may be laid on the state of being of having employees.

Therefore, however high the motives, this attempt by the men in Congress to take from a fraction of employers the money to be given by the Treasury of the United States to other men on their reaching sixty-five years of age, is not the levying of an excise but is a capricious confiscation.

3. IN TESTING THE VALIDITY OF THE LEVY ATTEMPTED IN SECTIONS 804 AND 802 AN UNCHANGING DECISION MUST BE MADE FOR ALL PURPOSES, AS TO WHETHER THE LEVY IS FOR GENERAL REVENUE ONLY OR IS FOR OLD AGE BENEFITS SUCH AS ARE DESCRIBED IN TITLE II.

The levy should not be deemed to be for such benefits, at one stage of argument in order to meet the charge of capriciousness, and for general revenue at another stage in order to meet the charge of absence of federal purpose.

Not infrequently, in briefs and arguments on this subject, there appear efforts to justify this attempted levy as a general revenue measure and to deny that the purpose of it is to provide old age benefits. Nevertheless, at other places in the same briefs and arguments, there appear efforts to justify the selections and exemptions which have been made, by pointing out the relation of these selections and exemptions, to the classes of persons who, under Title II, are to share in the benefits. Manifestly this is fallacious. The attempted levy is, for all purposes, either for general revenue, or for old age benefits. It cannot be sometimes for one and sometimes for the other.

4. IF FOR GENERAL REVENUE—AND EVEN IF NOT—THE ATTEMPTED LEVY IS SO CAPRICIOUS AND SO LACKING IN UNIFORMITY AS NOT TO BE IN CHARACTER A TAX.

The Circuit Court of Appeals found it unnecessary to decide this question.

This imposition is capricious and not uniform throughout the United States whether it be laid to produce general revenues of the Government of the United States or to provide the funds with which to pay the old-age benefits given by Section 202.

If general revenue is the purpose of the attempted imposition, there is no basis in reason for picking out certain faultless employers to bear the whole burden so as to relieve wealth generally from taxation to furnish the revenue. The time-honored example of a tax on red-headed men only, is no more beyond the bounds of reason than is this attempted imposition.

If the purpose is old-age benefits, there is no more reason for removing the burden from a tax on wealth to the shoulders of possibly propertyless employers who are not the cause of the old age.

Even if employers were selected to bear the burden, still, the attempted imposition would be capricious and anti-uniform, because there is no attempt to cover all in the same class.

If this attempted imposition is an excise, the subject matter excised is the state of being of having employees. In order to be uniform throughout the United States, it must cover everyone having that state of being throughout the United States. It is not contended that uniformity of a reasonable excise would be defeated by reasonable exemptions, reasonably selected, or that reasonableness is defeated by the fact that the Court can think of a wiser way of doing it.

In the present imposition, all three elements of reasonableness are lacking.

If men over sixty-five years of age ought to have an annuity or old-age benefit, they ought to have it because of that fact and not because of the type of employment in which they have been engaged. If employers ought to pay an excise for the state of being of having employees, they ought to pay it when they have that state of being.

The benefit and the burden, are capriciously limited in this attempted imposition.

It is the known fact that the imposition upon non-agricultural labor is equivalent to confining the imposition to certain States to the approximately complete exclusion of other States. It is capricious to deny the over sixty-five benefits to farm laborers and to relieve their employers from an imposition placed on other employers. Industry and trade do not produce age sixty-five any sooner than does agriculture.

House Report No. 615, hereinbefore described, submitted April 5, 1935, had attached to it schedules of the state of employment in normal times in the United States, as follows:—

Total number of gainful workers	48,830,000
Total number of workers, operators, self-employed (including the professions)	12,087,000
Total number of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers)	9,389,000
Estimated number of workers potentially benefited	27,354,000
	48,830,000

The gainful workers are divided, then, into:—

	Percentage
Owners, operators, and self-employed	24.8
Employees in occupations not subjected	19.2
Employees in employments subjected (including unemployed)	56.
	100.

Only 56% of the gainful workers are potentially to be benefited. The employers of only this 56% are subjected to the imposition.

Even this 56% is too large a figure, because as the Committee report says: — "The actual number of employees covered by the tax would be considerably smaller . . . due to unemployment."

The employers of the 56% bear not only the burden of caring by so much for the aged among the 56%, but also the burden of their share of taxes to meet the public expense for poor relief and assistance to the remaining 44% and of the unprovided for balance of the 56%. Crudely repeated: — The employers of the 56% pay 100% of the benefits for the 56%, and also 56% of 100% of the poor relief and assistance. These are average approximations subject to wide variations in individual cases and States. They are sufficiently accurate to show the capriciousness of the imposition on the 56%.

These capricious impositions do not deal in small amounts.

Senate Report No. 628, hereinbefore described, estimated that a tax of 1% on pay roll amounts to only about $\frac{1}{8}$ of 1% on sales. This referred to the tax under Title IX, dealing with unemployment. The employment there was more limited than the employment on which Title VIII attempts to impose. But, even

disregarding this, the report in this way indicates that when the impositions under the two Titles are in full sway, so that 9% on the pay rolls must be paid, the imposition is equivalent to a general sales tax of 3%.

As the tax is on employers in trade as well as in industry they, except in the case of imported merchandise sold, are taxed twice.

The United States Census Report for 1930, giving the figures for the year 1929, show the value or sale of

Industrial products	$70,434,863,000,
Wholesale trade	69,291,548,000,
Retail trade	49,114,653,000.

The employers in the production and trade in domestic industry in this way pay two taxes inevitably; and where the products pass through both wholesale and retail trade, three taxes. What passes from wholesale trade into the hands of the manufacturers as the raw material of those manufacturers, calls for another payment. It is beyond the possibility of accurate mathematical statement.

These compoundings are measurably avoidable in a general retail sales tax not falling on goods in the earlier operations of wholesale trade and manufacture. To some extent they are avoidable in a general manufacturer's tax. They cannot be avoided in a pay roll tax.

The Senate Committee Report estimated that for the year 1951 the tax receipts would amount to $2,724,000,000, and that in every year after 1943 they would amount to more than $2,000,000,000.

Whether this huge tax can all be passed on to the consumer, let him who claims the vision of an inspired prophet give the answer. It is the known fact to anyone familiar either with industry or with commerce, that in many cases the levy cannot be passed on without the destruction of the trade. If it cannot be passed on, the employer inevitably meets financial destruction when subjected to such a huge tax.

In what has been said above, attention has been called to the capriciousness of confining the benefit and burden to 56% of the gainful workers. This is not the whole story. If gainful workers ought to have an annuity after age sixty-five, so should all other persons. There is no reason for favoring those who have been able to get work and to work, to the exclusion of those who have been unable to get work or unable to perform it if they could get it. The true comparison, when dealing with old age annuities, is between the whole population, which may be taken, for this purpose, at 125,000,000. The estimated number of workers potentially to benefit — 27,354,000 — is less than 22% of the population. Less than 22%, then, of those who have to [illegible]d the danger of living after sixty-five are preferentially selected for this potential benefit.

If it be granted that those over sixty-five years of age should be provided for by society, it is capricious and anti-uniform to take the burden off wealth subject to tax and put it on a fraction of employers who are not the cause of men growing old and who have the same state of being of having employees which is enjoyed by a vast number of other people who are not subjected to the imposition.

The mere fact that property excised is not equally distributed throughout the United States does not make the tax anti-uniform.

> *Knowlton* v. *Moore*, 178 U. S. 41.
> *Head Money Cases*, 112 U. S. 580, 594.

Nor does the fact that other kinds of property are not taxed, at the same rate or at all if the selection is reasonable and not capricious.

> *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1.
> *Van Oster* v. *Kansas*, 272 U. S. 465.

An excise otherwise reasonably imposed to provide revenue for the general welfare of the Government of the United States may still be uniform even if reasonable exemptions are reasonably made.

Jeffrey Mfg. Co. v. *Blagg*, 235 U. S. 571.
N. Y. Central R. R. Co. v. *White*, 243 U. S. 188. (semble).
Florida v. *Mellon*, 273 U. S. 12.

A capricious selection of class of property, class of persons, or rate gradation is indicated by repeated language of the Supreme Court of the United States to make an attempted excise into an anti-uniform confiscation, without tax character.

Grosjean v. *American Press Co., Inc.*, 297 U. S. 233, 251.
Colgate v. *Harvey*, 296 U. S. 404, 422, 424.
Concordia Fire Ins. Co. v. *Illinois*, 292 U. S. 535.
Stebbins v. *Riley*, 268 U. S. 137.
Louisville Gas & Elec. Co. v. *Coleman*, 277 U. S. 32.
Schlesinger v. *Wisconsin*, 270 U. S. 230.
Bromley v. *McCaugn*, 280 U. S. 124, 139.
Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266, 272, *semble of a regulation.*
In re Opinion of The Justices, 85 N. H. 562; 154 Atl. 217 (semble).

This Court said in *Brushaber* v. *Union Pacific R.R.*, 240 U. S. 1, 24, that the breadth of the taxing power granted to Congress does not extend to a case "where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a

taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was **so wanting in basis for classification as to produce such a gross and patent inequality** as to inevitably lead to the same conclusion. (Type not heavy in original.)

The question recurs:—If the purpose of the levy is to provide general revenue, what conceivable reason can be advanced for turning from wealth and all usual objects of taxation, and for excising the harmless and laudable state of being of having employees in industry and in trade but not in agriculture or in domestic service however luxurious, and for picking upon incomes howsoever small under three thousand dollars? It is high caprice.

5. TO PROVIDE OLD AGE BENEFITS SUCH AS ARE DESCRIBED IN TITLE II IS NOT A PURPOSE FOR WHICH THE CONGRESS HAS POWER TO TAX.

The Circuit Court of Appeals so holds (R. 28).

This purpose is not for the common defense or to pay the debts of the Government of the United States or to provide for the general welfare of that Government. The power of The Congress to tax does not extend beyond providing for these three purposes.

The States when they set up the United States as a Government, did not make it an eleemosynary institution. The States imposed on the United States no duty to support the sick, the infirm, the unemployed, or the aged of the several states. The States respectively have that duty. As the States did not turn over to the new Government, this duty, they did not turn over the power to tax to provide for its performance. The States respectively continue to need the whole of that taxing power. They still have the whole of it. They did not turn over to the new Government the power to compel themselves to perform their respective duties to provide for the unfortunate. New Hampshire and South Carolina did not empower the new Government to draw from them or from their inhabitants the money with which to support the needy of Virginia and New York. The several States did not give to the new Government the power to tax to provide funds to make gifts not incident to the performance of its duty to govern within its category. The limits of its welfare were and are coincident with the limits of its category. Society's duty to care for the unfortunate rests on the State. It is within the State's category of government. The inhabitants of a State do not have two sovereigns to look to, for support. Governing by

providing for the care of the needy of a State is as much beyond the powers of the United States as governing interstate and foreign commerce, is beyond the powers of the State.

The people of the States are not subject to taxation by two sovereigns for a single purpose. If the purpose is to provide for the Government of the United States, a State may not tax for it. If the purpose is to provide for the Government of the State, the United States may not tax for it. The duty to govern and the power to tax are co-extensive and no more.

An imposition to provide old-age benefits regardless of need, to persons who are working or have worked in local employments in local trade and manufacturing within a State, not related to interstate or foreign commerce, or in any calling related to the matters subject to be governed by The Congress, is not to provide for the general welfare of the Government of the United States.

No question is presented in this case as to the beneficence or wisdom of old-age benefits to the needy or to the wealthy.

Ignoring payment of debts of the Government of the United States and providing for the common defence of the Government of the United States, no tax by The Congress is authorized unless it is to provide for the general welfare of the Government of the United States. The men in Congress who chose the Title for Chapter 531, said that it was "An Act to provide for the general welfare by establishing a system of Federal old-age benefits . . . " This selection of title suggests their avenue of approach; but this choice does not make the payment of such old-age benefits a part of the general welfare of the Government of the United States.

The limits upon the taxing power are not set by "welfare", only. They are set by the limits upon the

kind of welfare for which the tax may be levied. It must be the limited kind of welfare which is "general" and it must be the limited kind of welfare which is "of the United States." In this limitation, "of the United States" evidently is used in the sense of Government of the United States. The phrase would not be changed in meaning if put in the form "for the General Government and not for the State Governments".

In the Constitution, Article I, Section 8, it is obvious that "of the United States" qualifies not only "general welfare but also "common defence" and "debts". The qualification is used in the same sense in the three applications. "Debts" of the United States do not mean debts of the territory or of the people within the territory. They are the debts of the Government of the United States, either incurred or assumed. Equally, it is the general welfare of the Government of the United States that is described as the purpose to provide revenue for which The Congress may tax.

If it had been intended that The Congress should have power to legislate for the general welfare of the territory of the thirteen States, the Constitution would have said so. There does not appear in any clause of the Constitution, nor in the sum total of it, a grant of power to legislate for the general welfare of those residing in the territory of the several states separately or added together. There could not be a grant of such power in a constitution designed to preserve the existing complete sovereignty of the several States in all matters which related to the welfare of the people of those respective States, where the State could legislate concerning that welfare without interfering with the external relations of the group of States or the mutual relations between the States.

It is not to be supposed that a constitution would grant to The Congress of the United States a power to

tax to provide revenue for the general welfare of the territory of the United States when that Congress had been given no power to legislate for the general welfare of that territory.

The acquiring, the holding, or the disposing of territory outside the confines of the particular States was an external matter and by the Constitution was made a part of the "general welfare of the United States". Such territory could be obtained by treaty or by war—sovereign powers expressly granted to the United States. The particular powers granted, all relate to foreign relations or to mutual relations, and none to the governing of the composite of the thirteen territories.

If it were not for the phrase, "general welfare of the United States" the Constitution would contain no grant of any power to tax except to pay the debts and provide for the common defence. It is only in this third classification of objects — "general welfare of the United States" — that there is found any power to tax for the purpose of running the government of the United States including therein all those things other than payment of debts and providing for common defence which the United States may do.

In determining the meaning of this phrase, "general welfare of the United States", it is respectfully urged upon the Court that what is to be looked for is the meaning of that phrase in 1788 to the ordinary people of the thirteen States which joined in making the contract tendered to them, respectively, for adoption. It makes no difference what any of the draftsmen or proponents thought that it meant, if that differs from the common understanding of it which the three million ordinary men and women of the times should have had when they were deciding whether or not to adopt it.

The Articles of Confederation which were the forerunner of the Constitution, made among the same

thirteen sovereign States that made the Constitution, contained the phrase, "welfare". These Articles start off with the agreement that "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled". By Article III they entered into a "firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attacks made upon them or any of them on account of religion, sovereignty, trade, or any other pretense whatever." Anyone knows without argument that this gave no power to the Confederation to govern the territory of the thirteen sovereigns for the welfare of the citizens of those States. The welfare which the Confederation was to care for, was the welfare in external relations — general, as distinct from local or internal, and mutual, in the relations between the sovereigns.

When the words "General Welfare", came into the Constitution from the same States which had used them in the Articles of Confederation, they meant the same thing. The external relations — such as war, defensive or aggressive; acquisition of external territory by treaty; foreign commerce, naturalization — were made clear. The mutual relations — such as interstate commerce; postal communication, bankruptcy which would affect debts and credits of men in different States, patent rights, money, were made clear. These foreign relations and mutual relations, with such implications as arise from them, comprehend all that was put into the hands of the Government of the United States. The governing in those matters was what constituted the general welfare of that government. It was for that

government that the power to tax was given. All the specifically described powers, and all the generally indicated powers, of the Government of the United States fall into one or another of these two classes, — foreign relations and mutual relations.

The terms "general" and "of the United States" are not terms of extension. They are terms of restriction upon the kind of welfare to provide revenue for which the Congress may levy a tax. They stand opposite to the restrictions of "State" or "local" in defining the welfare for which a State may levy a tax.

The novel feature of the Constitution of the United States was the erecting of two absolute sovereignties over one territory. Thirteen sovereigns erected a new sovereign but retained all the sovereign powers except those transferred to the Nation expressly or by reasonable implication. The thirteen States were the contracting parties who did this by ratifying, in separate Conventions, in the respective States, the Constitution which had been proposed by the draftsmen of the document.

Welfare evidently is served by bringing arid lands into needed cultivation. Nevertheless, the Supreme Court has said: — "While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation". (*Kansas* v. *Colorado*, 206 U. S. 46, 92).

As far as it may be done by legislation, the control of the relation between employer and employee, the rate of wages, the withholding of wages to build reserves, the insurance against accidents, the making of reserves for the employee when he no longer or not for a time can earn wages, within a State, in labor local to that State, between residents or operators within the State, and not in the course of interstate commerce, is in the legislature of the State and not elsewhere. The Congress has no more control over it than has the Canadian Dominion Parliament or that of Great Britain. That local relation is not a feature of the welfare of the Government of the United States. If it turns out to be that this feature of the welfare of each State calls for similar or the same control in each other State by the legislature of this other State, these forty-eight States' welfares do not hatch out into the general welfare of the Government of the United States.

Picture, if you will, the consternation of the men of the thirteen sovereign States, engaged in considering whether or not to enter into the compact of the Constitution, if they had been told that they were handing over to the new Nation the control of the way in which the aged within a State, needy or wealthy, should be supported, and power to draw from the State of Georgia or South Carolina a part of the money with which to support the aged, indigent, or wealthy, in the State of New York or Massachusetts. The surprise would have been great, to know that The Congress could regulate the employment relation internal in a particular State and provide that an employer must, whether he wished or not, give to an employee, whether he demanded it or not, a minimum wage which must include not only a reasonable wage and a living wage but also an old-age annuity. It is self-evident that what the employer must pay in taxes for old-age benefit he cannot pay in

larger wages currently to enable the thrifty employees to provide for their own old age. The attempted imposition says to the employer that he shall pay to the employee only 97% of what he agreed to pay him in local employment in a State between residents of that State for services to be performed therein. Should the contracting parties, in adopting the Constitution, have understood that they were giving away this power?

The contracting parties, the men of the several States, never conceived that they were giving away this power to a new, distant sovereign. They had no reason to conceive it. They made no such grant. Instead they reserved any such power, if it existed, to the people of their separate sovereign State.

Of course, if The Congress may impose on a non-wealthy few the support of the many over sixty-five years of age, whether wealthy or indigent, The Congress may do the same as to the support of those over thirty years of age. If the power exists, The Congress is the one to say where the line shall be drawn. It makes no difference that no one would suppose that The Congress would put the support of the many, needy or wealthy, of some States, upon the few wealthy or poor of other States. It is what the men in Congress have attempted in the proposed Act now at bar. The granting of such a vast power, the adopters of the Constitution never conceived of. No such grant was made.

The support of men and women who have come to be sixty-five years old in the respective states or who cannot get employment is no more for the general welfare of the Government of the United States than is the keeping the citizenry of the United States from becoming drug addicts and thereby likely to be unable to earn a living or to fight for the United States or to

vote intelligently to choose the President and the Senators and the Representatives in The Congress thereof.

Nevertheless, it seems that the Supreme Court is unanimous that provisions of an anti-narcotic act, not to collect an excise on a dangerous article of commerce, but primarily to suppress that intrastate trade would not be for the general welfare of the United States in the sense in which those words are used in the Constitution and that they would invade the territory of government of the States.

Linder v. *United States*, 268 U. S. 5, 17.
United States v. *Doremus*, 249 U. S. 86, 95.
United States v. *Jin Fuey Moy*, 241 U. S. 394, 401.

Local commercial activities and employment relations completed wholly within a State, howsoever common they may be in every State, are not a part of the general welfare of the Government of the United States.

Schechter Poultry Corp. v. *United States*, 295 U. S. 495.
United States v. *Butler*, 297 U. S. 1.
Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330 (*a fortiori*).
Child Labor Tax Case, 259 U. S. 20.
Hill v. *Wallace*, 259 U. S. 44.
Hammer v. *Dagenhart*, 247 U. S. 251.

In the range of interstate commerce, where Congress has authority, "Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly" (Hughes, C. J., in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 317).

In the case cited, it would seem to be that, if there were no possible relation to interstate commerce, the Court was unanimous.

Carter v. *Carter Coal Co.*, 298 U. S. 238.

If no relation to interstate commerce or other substance within the regulatory power of The Congress is involved, it seems that the Court is unanimous that an Act for a compulsory pension system is not within the powers of The Congress.

Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330, 362, 368, 375, 381.

The court is unanimous that Congress has no power to regulate the financial relation between employers and employees such as old-age annuities or other wages in a local business unrelated to interstate commerce.

Schechter Poultry Corp. v. *United States*, 295 U. S. 495.

The present attempt is to regulate wages by providing that the employer need pay only 97% of what he agreed to pay but that he must, as a part of the wage, furnish a continuation of a portion of the wage after the earner reaches sixty-five years of age and ceases to be in his employ. The State where this local employment occurs may deem that it would be wiser to regulate the relation in a different way, to provide no or a smaller annuity with no or a smaller compulsory contribution. The same thing cannot be done by The Congress and by the State Legislature. If it is a subject for legislative regulation at all, the Tenth Amendment says that it is to be regulated by the State Legislature and not by The Congress.

The Supreme Court, holds by implication that regulations of the relations between employers and employees by impositions on employers to provide a

reserve fund for unemployment benefits to persons formerly employed in employments in the State's category whether by these employers or by others, are not within the power of The Congress, because these impositions are within the powers of the State legislature.

W. H. Chamberlin, Inc. v. *Andrews*, (November 23, 1936), 299 U. S. VII, 57 S. C. R. 122; 271 N. Y. 1, 2 N. E. Rep. (2nd Ser.) 22.

They cannot be in the legislative control of both sovereignties.

Collector v. *Day*, 11 Wall. 113, 124.

Impositions for old-age benefits do not differ in this respect from those for unemployment benefits.

The particular limit to "general welfare", as to which Hamilton and President Madison differed and President Monroe vacillated, is not involved. None of them suggested that any such regulations of employment obligations and relations within a State come within this phrase. None of them, it seems, would have supported a power in The Congress to compel employers and employees in purely local employment to contribute to a fund for old-age annuities for others.

President Jackson, May 27, 1830, vetoed the Maysville Road Bill on the ground that such an appropriation could not be said to be for "general welfare" and that Congress ought not to expend where it has not jurisdiction (2 Richardson, 483, 492, 639). President Buchanan, February 24, 1859, vetoed the Act for the endowment of a college in every State with the message: — "I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes out of the people of the United States, for the purpose of educating the people of the respective States." (5

Richardson, 547) It seems that his meaning would cover as well — "for the purpose of supporting the aged people of the respective States". President Cleveland in 1887 vetoed an attempted Act of The Congress to aid Counties in Texas injured by drought. In his message he said: — "I can find no warrant for such an appropriation in the Constitution" (8 Richardson 557). Like an echo of a receding past, now growing inaudible, comes the rest of the message: — "the lesson should be constantly enforced that though the people support the Government the Government should not support the people." These convictions have particular force held as they were by revered leaders of the party in control of The Congress whose members are responsible for the attempt now before the Court. The limits set by the Constitution are not newly invented now, to defend against newly conceived attempts to invade.

There is no concurrent sovereignty of the Nation and of the separate States. The Nation is the absolute sovereign in its category of government. Each separate State is absolute sovereign in its category of government. The boundary line between the categories takes the place of the boundary line between territories of neighboring sovereigns.

Collector v. *Day*, 11 Wall. 113, 124.

Nothing is "general welfare of the United States" except that which is within the boundary lines of its category. "United States" as used in the Constitution is not a territory. It is a sovereign government. The State government is a sovereign government.

6. IN FACT AND IN LAW, IN THE SECTIONS UNDER CONSIDERATION, 804 AND 802, THIS IS NOT A TAXING STATUTE. IT IS AN ATTEMPTED STATUTE TO REGULATE THE WAGE RELATION BETWEEN EMPLOYERS AND EMPLOYEES IN EMPLOYMENT WITHIN THE SEVERAL STATES.

It requires that in return for their work, the employees receive from their employers, as wages not only their weekly or monthly money but also an insurance policy for more money after they reach the age of sixty-five. The Congress has no power so to regulate.

It is a State power, if it is legislative.

West Coast Hotel Co. v. *Parrish*, March 29, 1937, 300 U. S. ——, 57 S. C. R. 578.

The British Privy Council, on January 28, 1937, in Appeal No. 101 of 1936 — *The Attorney General of Canada, Appellant* v. *The Attorney General of Ontario and Others, Respondents*, handed down a decision affirming a decision of the Supreme Court of Canada (In the matter of a Reference 1936 Canada Law Reports, Part VII, page 454) and holding that an imposition analogous to that under Title IX of the Social Security Act is not characteristically a tax for a Dominion purpose and is *ultra vires* of the Parliament of Canada. On this subject there is an evident comparability between the organic act for the Dominion of Canada in its relation to the Provinces, and the Constitution of the United States.

The Act held to be *ultra vires* purported to make levies on employers and employees, to be paid by revenue stamps, to provide a portion of an unemployment compensation fund of which the balance was to

be provided by the Dominion. The seemingly controlling words of the opinion are: —

"That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied." . . .

"In the present case their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employees in each Province, and as such is invalid."

(Above quotations not compared with official text.)

The legislatively controllable wage relation, in local matters within a State, whether in present money or in old age benefits, is within the powers of the Government of the State and not within the powers of the Government of the United States.

The State may enforce its own policy that the old age benefit shall be larger or smaller or none at all and that thrift shall be encouraged by confining old age assistance to needs only, and by not building up a class of pensioners.

If the employer is forced by the United States to contribute toward an old age benefit fund, it makes no difference whether the exaction is called a tax or is called a contribution. It is a regulation of the terms of employment whereby the employer must as a part of the wage contribute something more for the old age of the employee.

The States by the Constitution not only did not give this power to the United States but also by the Ninth and Tenth Amendments, they expressly withhold the power.

The Congress has no power so to regulate the relations of the people within the several States, even by calling the regulation a tax.

Respectfully submitted,

EDWARD F. McCLENNEN
JACOB J. KAPLAN

Co-operators in the preparation of this brief are: E. Curtiss Mower, Jr., Edward Williamson, Roger E. Ela, Leonard Kaplan, Robert Vance Brown.

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